STATE OF MICHIGAN

COURT OF APPEALS

PREMIER CENTER OF CANTON, L.L.C.,

Plaintiff-Appellee,

and

THE KROGER COMPANY OF MICHIGAN,

Intervening Plaintiff-Appellee

v

NORTH AMERICAN SPECIALTY INSURANCE COMPANY,

Defendant/Cross-Plaintiff/Third-Party Plaintiff-Appellee,

and

ASPHALT SPECIALISTS, INC.,

Defendant/Cross-Defendant-Appellant,

and

LOU'S TRUCKING COMPANY, INC., d/b/a RENTAL SPECIALISTS, L.L.C., LOU'S SCRAP TRANSPORT, INC., TKMS, LTD., DANIEL ISRAEL and BRUCE ISRAEL,

Third-Party Defendants-Appellants.

UNPUBLISHED
November 29, 2011

No. 297799
Wayne Circuit Court
LC No. 08-017780-CK

Before: MURPHY, C.J., and BECKERING and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant, Asphalt Specialists, Inc. (ASI), and third-party defendants, Lou's Trucking Company, Inc., Lou's Scrap Transport, Inc., TKMS, Ltd., Daniel Israel, and Bruce Israel (ASI and third-party defendants are collectively referred to as the indemnitors), appeal as of right from the judgment against them and in favor of third-party plaintiff, North American Specialty Insurance Company (North American). We affirm.

I

The indemnitors argue that the trial court erred in granting summary disposition regarding liability on the underlying breach of contract claims in favor of plaintiff, Premier Center of Canton, L.L.C. (Premier Center), and intervening plaintiff, The Kroger Company of Michigan (Kroger). We disagree.

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Davenport v HSBC Bank USA*, 275 Mich App 344, 345; 739 NW2d 383 (2007). The trial court cited MCR 2.116(C)(10) in granting summary disposition to Premier Center and Kroger. "In reviewing a motion under MCR 2.116(C)(10), this Court considers the pleadings, admissions, affidavits, and other relevant documentary evidence of record in the light most favorable to the nonmoving party to determine whether any genuine issue of material fact exists to warrant a trial." *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). "Summary disposition is appropriate if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008).

However, to the extent that the trial court granted summary disposition to Premier Center and Kroger on the basis of the doctrine of collateral estoppel, the decision is more properly reviewed under MCR 2.116(C)(7). "Summary disposition on the basis of collateral estoppel . . . is pursuant to MCR 2.116(C)(7)." *Alcona Co v Wolverine Environmental Prod, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). "An order granting summary disposition under the wrong court rule may be reviewed under the correct rule." *Shirilla v Detroit*, 208 Mich App 434, 437; 528 NW2d 763 (1995). "The mislabeling of a motion does not preclude review where the lower court record otherwise permits it." *Ellsworth v Highland Lakes Dev Assoc*, 198 Mich App 55, 57-58; 498 NW2d 5 (1993). In considering whether to grant summary disposition under MCR 2.116(C)(7), a "court may consider all affidavits, pleadings, and other documentary evidence, construing them in the light most favorable to the nonmoving party." *Alcona Co*, 233 Mich App at 246. Further, the application of the doctrine of collateral estoppel is a question of law that is reviewed de novo. *Estes v Titus*, 481 Mich 573, 578-579; 751 NW2d 493 (2008).

"Collateral estoppel, or issue preclusion, precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding." *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). "A person is in privy to a party if, after the judgment, the person has an interest in the matter affected by the judgment through one of the parties, such as by inheritance, succession, or purchase." *Husted v Auto-Owners Ins Co*, 213 Mich App 547, 556; 540 NW2d 743 (1995), aff'd 459 Mich 500 (1999). "In order for collateral estoppel to apply, the same ultimate issues underlying the first action must be involved in the second action, and the parties

must have had a full opportunity to litigate the ultimate issues in the first action." *VanDeventer v Mich Nat'l Bank*, 172 Mich App 456, 463; 432 NW2d 338 (1988). Collateral estoppel "is a flexible judge-made rule generally said to have three purposes: To 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.'" *Detroit v Qualls*, 434 Mich 340, 357 n 30; 454 NW2d 374 (1990), quoting *Allen v McCurry*, 449 US 90, 94; 101 S Ct 411; 66 L Ed 2d 308 (1980).

Here, the issue whether ASI breached a settlement agreement in a prior lawsuit by failing to repair a parking lot was actually and necessarily determined when the trial court in the prior action granted Premier Center's motion to enforce the settlement agreement. See *Ditmore*, 244 Mich App at 577. The parties had a full and fair opportunity to litigate the issue in the context of Premier Center's motion to enforce the settlement agreement. See *VanDeventer*, 172 Mich App at 463. ASI, Premier Center, and Kroger were all parties to the prior proceeding. See *Ditmore*, 244 Mich App at 577. Although third-party defendants were not parties to the prior proceeding, they are in privity with ASI because they have an interest in the matter affected by the judgment through ASI. See *Id.*; see also *Husted*, 213 Mich App at 556. Third-party defendants and ASI entered into an indemnity agreement with North American in connection with the issuance of a bond assuring ASI's performance of its obligations under the settlement agreement in the first lawsuit.

The indemnitors argue that the issue was not actually litigated because it was not put into issue by the pleadings in the prior action. They cite *VanDeventer*, 172 Mich App at 463, stating that "[a] question has not been actually litigated until put into issue by the pleadings, submitted to the trier of fact for a determination, and thereafter determined." The indemnitors note that a motion to enforce a settlement agreement is not included in the definition of "pleading" set forth in MCR 2.110(A). However, the indemnitors fail to explain why ASI's obligation to repair the parking lot was not put into issue by the pleadings in the prior action. The prior lawsuit arose out of a dispute regarding an agreement to perform construction work that included the parking lot at issue. The parties then reached a settlement agreement, and a dispute later arose regarding ASI's obligation to repair the parking lot under the settlement agreement. Thus, the question regarding ASI's obligation to repair the parking lot was put into issue by the pleadings in the first action. Also, the fact that the trial court rather than a jury decided the issue does not preclude application of collateral estoppel. See *Qualls*, 434 Mich at 356 n 27 ("A judgment is considered a determination of the merits, and thereby triggers the doctrine of collateral estoppel on relitigation, even if the action has been resolved by a summary disposition."). Here, the trial court in the prior action properly decided the issue in the context of Premier Center's motion to enforce the settlement agreement.

The indemnitors also contend that collateral estoppel cannot apply because the order enforcing the settlement agreement in the prior action was not a final judgment. They note that in dismissing ASI's claim of appeal from the settlement enforcement order, this Court stated that the order dismissing the prior lawsuit pursuant to the settlement agreement, rather than the subsequent order enforcing the settlement agreement, was the first judgment or order that disposed of all the claims and adjudicated the rights and liabilities of all the parties. *LaSalle, Inc v Premier Center of Canton, LLC*, unpublished order of the Court of Appeals, entered January 14, 2009 (Docket No. 288976). The indemnitors cite no authority to establish that a final

judgment for purposes of collateral estoppel must be a final order for the purpose of filing an appeal of right. "This Court will not search for authority to sustain or reject a party's position. The failure to cite sufficient authority results in the abandonment of an issue on appeal." *Hughes v Almena Twp*, 284 Mich App 50, 71-72; 771 NW2d 453 (2009) (citation omitted). In any event, the first lawsuit culminated in a valid final judgment. The order dismissing the first lawsuit pursuant to the settlement agreement disposed of all the claims and adjudicated the rights and liabilities of all the parties. Subsequently, after a dispute arose regarding ASI's performance, the trial court entered an order enforcing the settlement agreement. That order actually and necessarily determined the issue regarding ASI's obligation to perform the repairs. Therefore, application of the doctrine of collateral estoppel is appropriate.

Because we conclude that collateral estoppel bars relitigation of the underlying issue regarding whether ASI breached the settlement agreement, we do not reach the underlying breach of contract issue.

II

The indemnitors also argue that the trial court erred in granting summary disposition to North American on its contractual indemnification claim. We disagree.

The construction of unambiguous contractual language is a question of law that is reviewed de novo. *Roberts v Titan Ins Co (On Reconsideration)*, 282 Mich App 339, 348; 764 NW2d 304 (2009). "A right to indemnification can arise from an express contract, in which one of the parties has clearly agreed to indemnify the other." *Hubbell, Roth & Clark, Inc v Jay Dee Contractors, Inc*, 249 Mich App 288, 291; 642 NW2d 700 (2002). "An indemnity contract is construed in the same fashion as are contracts generally." *Zurich Ins Co v CCR & Co (On Rehearing)*, 226 Mich App 599, 603; 576 NW2d 392 (1997). "When the terms of a contract are unambiguous, their construction is for this Court to determine as a matter of law." *Hubbell*, 249 Mich App at 291. "This Court must determine the intent of the parties to a contract by reference to the contract language alone. This Court may not look outside the contract to assess the parties' intent." *Id*. See also *Grand Trunk Western R, Inc v Auto Warehousing Co*, 262 Mich App 345, 353; 686 NW2d 756 (2004) ("Where parties have expressly contracted with respect to the duty to indemnify, the extent of the duty must be determined from the language of the contract.").

Here, the indemnity agreement required the indemnitors to

> exonerate, hold harmless, and indemnify the Surety [i.e., North American] from and against any and all liability, loss, costs, damages, fees of attorneys and consultants, and other expenses, including interest, which the Surety may sustain or incur by reason of, or in consequence of, the execution of such bonds and any renewal, continuation or successor thereof, including but not limited to, sums paid or liabilities incurred in settlement of, and expenses paid or incurred in connection with claims, suits or judgments under such bonds, expenses paid or incurred in enforcing the terms hereof, in procuring or attempting to procure a release from liability, or in recovering or attempting to recover losses or expenses paid or incurred, as aforesaid.

This contractual language unambiguously required the indemnitors to indemnify North American for all liability, costs, damages, attorney fees, consultant fees, and other expenses sustained by reason of the execution of the bond. Further, the contract granted North American

> the exclusive right to decide and determine whether any claim, liability, suit or judgment made or brought against the Surety or the Indemnitors, or any one of them, on any such bond shall or shall not be paid, compromised, resisted, defended, tried or appealed, and the Surety's decision thereon, if made in good faith, shall be final and binding upon the Indemnitors.

This provision clearly authorized North American to decide whether to pay Premier Center and Kroger to settle their underlying claims; the only limitation is that North American's decision must have been made in "good faith."

The indemnitors contend that North American failed to act in good faith when settling the underlying claims. The indemnity agreement does not define the term "good faith." "Unless otherwise defined, contractual language is given its plain and ordinary meaning." *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006). "Courts may consult dictionary definitions to ascertain the plain and ordinary meaning of terms undefined in an agreement." *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010).

Random House Webster's College Dictionary (2000) defines "good faith" as "accordance with standards of honesty, trust, sincerity, etc." This definition accords with Michigan case law. In *People v Downes*, 394 Mich 17, 26; 228 NW2d 212 (1975), the Michigan Supreme Court, interpreting a statute authorizing a physician in good faith to prescribe and dispense narcotic drugs, noted that the term "'[g]ood faith' consistently has been deemed a standard measuring the state of mind and perception of the defendant—a measure of honest belief and intention." The *Downes* Court also quoted with approval language in *Smith v State*, 214 Ind 169, 174; 13 NE2d 562 (1938), stating that "'good faith' needs no definition other than that implied by the words themselves" and that "good faith means 'good intentions and the honest exercise of his best judgment as to the need of [defendant doctor's] patient." *Downes*, 394 Mich at 25, quoting *Smith*, 214 Ind at 174.

In *Shaffner v Riverview*, 154 Mich App 514, 518; 397 NW2d 835 (1986), this Court adopted the *Downes* definition of "good faith" in the context of a contribution statute. In *Miller v Riverwood Recreation Center, Inc*, 215 Mich App 561, 570; 546 NW2d 684 (1996), this Court, again addressing the right of contribution, relied on *Downes* and *Shaffner* to "conclude that 'good faith' should be analyzed with respect to the settling parties' negotiations and intent. This is the usual way in which the 'good faith' of agreements is analyzed." "'Good faith' has been defined as a standard measuring the state of mind, perceptions, honest beliefs, and intentions of the parties." *Id*. The *Miller* Court also noted that Black's Law Dictionary (6th ed) "defines 'good faith,' in part, as 'an honest belief, the absence of malice and the absence of design to defraud or to seek an unconscionable advantage.'" *Id*. at 571, quoting Black's Law Dictionary (6th ed). "In contrast, 'bad faith,' in the insurance context, has been defined as 'arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.'" *Id*., quoting *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 136; 393 NW2d 161 (1986). "[A] claim of bad faith cannot be based upon negligence or bad judgment 'if the actions

were made honestly and without concealment.'" *Id.*, quoting *Commercial Union*, 426 Mich at 137.

Here, the indemnitors have adduced no evidence that North American failed to act in good faith when it decided to settle the underlying claims. There is no indication that North American's decision to settle reflected anything other than an honest exercise of judgment. ASI's disagreement with the settlement decision does not establish that North American acted in bad faith. The indemnitors' contention that North American settled to avoid having its employees deposed is mere speculation. Further, the trial court had already determined that ASI and North American were liable for breach of their obligations under the bond and limited their ability to contest damages to the costs of the repairs. These decisions by the trial court supported North American's conclusion that settlement was a prudent course of action. North American settled for less than the amount claimed by Premier Center and Kroger, thereby protecting itself and ASI from the possibility of a larger judgment and further litigation costs. North American's email to Premier Center and Kroger expressing its interest in settling the underlying claims does not reflect a reckless or intentional disregard of ASI's interest. Parties to a lawsuit often engage in such discussions when attempting to reach a compromise. Also, ASI's offer to post collateral after it discovered the settlement agreement does not establish that North American acted in bad faith; otherwise, a principal could always block a surety's decision to settle, essentially nullifying the surety's exclusive contractual authority to make such decisions.

Because no evidence exists that North American acted in bad faith when it decided to settle the underlying claims, its decision was final and binding upon the indemnitors under the parties' agreement. Thus, the trial court properly concluded that North American is entitled to summary disposition regarding its contractual indemnity claim.

In light of our resolution of the contractual indemnity issue, we need not address whether North American was entitled to summary disposition regarding its common-law indemnity claim.

Affirmed.

/s/ William B. Murphy
/s/ Jane M. Beckering
/s/ Amy Ronayne Krause